IN THE
Supreme Court of the United States
October Term, 1989

GEORGE MARTORANO,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Court of Appeals denied petitioner his due process rights when

a. it based its decision on a set of facts not supported by the record or urged by either party;

b. it misstated petitioner's legal arguments and addressed only the misstatements;

c. it incorrectly applied the procedural bars of laches and law of the case to avoid reaching the issues raised;

d. it ignored the uniformly accepted principle that 28 U.S.C. §455(a) does not require actual bias for judicial recusal;

e. it relied on findings made by the District Court without reference to the defense evidence?

LIST OF PARTIES

Apart from the party named in the caption of this Petition, there are no parties to whom the issues raised herein are applicable. However, the original indictment did include co-defendants, only one of whom, Kevin Rankin, was tried by a jury.

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Petitioner, George Martorano, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, affirming the judgment of conviction entered against him by the United States District Court for the Eastern District of Pennsylvania (Hannum, J.).

OPINIONS BELOW

The opinion of the Court of Appeals appears in the appendix hereto at pp. 1a-20a, while the court's denial of petitioner's motion for a rehearing, with a suggestion that it be *en banc*, appears in the appendix at pp. 21a-22a.

JURISDICTION

The date of the judgment of the United States Court of Appeals for the Third Circuit was January 11, 1989, while the date of the order denying a rehearing of the judgment was September 20, 1989. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

1. United States Constitution, Amendment V
2. 28 U.S.C. §144
3. 28 U.S.C. §455(a)

The texts of these provisions appear in Appendix D.

STATEMENT OF THE CASE

George Martorano was convicted, upon his plea of guilty to all 19 counts of a narcotics indictment, including one count of managing a continuing criminal enterprise (21 U.S.C. §848). A single sentence of life imprisonment with no possibility of parole or good time was imposed on August 20, 1984 and, following a remand from the United States Court of Appeals for the Third Circuit, was reimposed on April 22, 1988. On January 11, 1989, a panel of the United States Court of Appeals affirmed Martorano's conviction, and on September 20, 1989, Martorano's motion for a rehearing was denied.

The following chronology of the case will be useful to an understanding of all petitioner's arguments:

March 15, 1984
: conflict of interest hearing following the indictment of Robert Simone, Martorano's trial counsel, on tax evasion charges (A15)[1]

April 24, 1984
: colloquy suggesting that Judge John B. Hannum knew he would testify at Simone's trial (A 34)

June 4, 1984
: Martorano pled guilty (A115)

July 20, 1984
: Judge Hannum testified at Simone's trial

August 20, 1984
: Judge Hannum imposed a nonparolable life sentence on Martorano

January 6, 1986
: the Third Circuit vacated Martorano's sentence and remanded the case because Judge Hannum had not ascertained whether Martorano had been afforded an opportunity to read his presentence report (pp. 25a-26a, *infra*)

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1. All numbers in parentheses preceded by "A" refer to the Joint Appendix prepared for the Court of Appeals, which petitioner will ask the clerk of that court to transmit to this Court pursuant to Rule 19.1.

September 5, 1986

Chief Judge Fullam disqualified Judge Hannum from the retrial of co-defendant Kevin Rankin

April 13, 1988

Rankin indicted for perjury in connection with his motion seeking Judge Hannum's recusal from his retrial (A366)

April 22, 1988

non-parolable life sentence reimposed upon Martorano (A650)

A. The Recusal Motions

Since the Court of Appeals panel which decided the first appeal had declined to send the case back to a new judge as Martorano had requested, and suggested, instead, that a recusal motion was more appropriate (p. 28a n.1), a motion was filed upon remand. It was grounded in the appearance of impropriety caused by Judge Hannum's testimony as a character witness at the trial of Martorano's former attorney, Robert Simone. This testimony, which occurred between Martorano's plea and sentence, appeared to have been volunteered.[2]

Before the motion was decided, it was supplemented following the September 5, 1986, disqualification, under 28 U.S.C. §144, of Judge Hannum from the retrial of co-defendant Kevin Rankin by Chief Judge Fullam. The essence of the new motion was that it might appear to the reasonable person that any ill will which Judge Hannum bore towards Rankin—who was allegedly Martorano's lieutenant—would impact on his ability to act impartially with respect to Martorano.

Without questioning any of the factual allegations in the original motion, Judge Hannum refused to recuse himself, holding that, while "a reasonable person might conclude that this judge's appearance on behalf of Simone was 'highly

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2. On April 24, 1984, a month after Simone's indictment and three months before Judge Hannum's testimony on his behalf, the following colloquy took place:

THE COURT: And if that case went on July 9—

MR. SIMONE: Well, it can't if I am here.

THE COURT: Well, it might involve this Judge. Do you follow me?

MR. SIMONE: I understand, your Honor. (A34)

unusual,' " "[o]nly speculation" would lead him to question the Judge's impartiality and "a reasonable man would not speculate." (A56-57) In a footnote, Judge Hannum added that a reasonable person would also not question his ability to be fair as a result of the Rankin disqualification. (A57, n.7)

Martorano renewed the recusal motion when he sought to withdraw his plea, arguing that the previously raised grounds, combined with the fact that the basis of the plea withdrawal motion was his belief that Judge Hannum had made an off-the-record promise about the sentence to be imposed, would cause a reasonable man to doubt Judge Hannum's impartiality. This motion was also denied because "[o]nly speculation would lead a reasonable man to conclude that this Court entered into an off-the-record deal with Simone, Esquire." (A185)

The fourth and final recusal motion was made on April 26, 1988, and was based on the fact that Judge Hannum was to be a witness at Rankin's upcoming trial on perjury charges resulting from Rankin's recusal motion. (A366) Without hearing from the government or commenting on the facts presented, Judge Hannum denied the motion (*Id.*).

B. The Plea Withdrawal Motion

Prior to the resentencing, Martorano also moved to withdraw his plea, arguing that: (a) he had been consistently protesting his innocence of the most serious charges in the indictment; (b) his claim of innocence was supported by evidence from both government and defense doctors that he lacks the mental and educational capability to organize and operate a $75 million a year drug enterprise; (c) he did not understand the plea allocution, which was peppered with polysyllabic words and legal terminology; (d) he was under the influence of controlled substances at the time of the plea; (e) he believed that Judge Hannum had told his attorney that he would impose a ten year sentence; (f) neither he nor his attorney understood that he could be sentenced to spend the remainder of his natural life in prison; and (g) he was deprived of the effective assistance of counsel by the conflict which his attorney allowed to be created when he sought Judge Hannum's testimony at his own trial. These claims were supported by affidavits from former and present counsel, Martorano, and family members who had been present at the plea and sentencing.

Although Martorano presented substantial evidence which had not been in the record at the time of his first appeal, Judge Hannum summarily denied the motion on the ground that the decision in the first appeal constituted the law of the case. (A186-87)

C. The Various Sentencing Proceedings

1. October 23, 1987

The proceedings were adjourned because Haldol—a strong tranquilizer prescribed at the prison to control Tourette's Syndrome—had been improperly administered, causing Martorano to be unable to respond to the allocution. (A190-205)

2. November 6, 1987

At the outset of the proceedings, counsel challenged several portions in the supplemental PSI prepared following the remand, as well as the original report. These challenges focused on: (a) Martorano's mental problems; (b) his capacity to have committed an offense of the magnitude alleged; and (c) allegations that he was involved in violence. (A219-25)

Counsel then argued there were many reasons why a non-parolable life sentence should not be imposed. These begin with Martorano's childhood: he grew up in a family without any real role model because his male relatives were incarcerated; he began to use drugs when he was 12 years old; and his mental problems had already begun to manifest themselves. (A239-41) These problems continued into adulthood and now he has borderline intelligence, drug-induced organic brain syndrome, as well as Tourette's disease. (A242, 259-60) The bottom line, is that "this is not a man beyond salvation. . . ." (A242) Indeed, were he to be sentenced under the sentencing guidelines, Martorano would be able to prove that he could be a productive, law-abiding citizen. (A244-45)

The government focused on the criminality of Martorano's father, whom it alleged to be a significant organized crime figure in Philadelphia, and its belief that Martorano's mental and health problems were feigned. (A251-58) Judge Hannum imposed a non-parolable life sentence and ordered a study pursuant to 18 U.S.C. §4205. (A260-61)

3. March 24, 1988

After conducting a hearing into the effects of the medica-

tions Martorano was still receiving (Sinequan and Dilantin)[3] Judge Hannum allowed further argument regarding the sentence to be imposed. Defense counsel challenged the conclusion of the study that Martorano was a malingerer—both in terms of his mental abilities and his claim of having Tourette's Syndrome—and requested a hearing. (A287-304, 318)

Judge Hannum granted the hearing (A328-29) after noting that, between the ages of 18 and 22, Martorano had run "dirty bookstores", that he had not cooperated, and that, at some point "in the islands off Florida . . . he had rather unusual, let's say, sex activity." (A319-23)

4. The Medical Hearing—April 26, 1988

a. The Defense Witnesses

DR. KENNETH RICKLER, a behavioral neurologist, testified that, based on a recent examination; history provided by Martorano, his sister and their mother; prison medical records; and videotapes made during the investigation, he diagnosed Martorano as suffering from Tourette's Syndrome, with associated learning disabilities, as well as an attention deficit. (A482-86, 493-94, 515) Tourette's Syndrome is

> an involuntary movement disorder which has a number of facets or components to it. The most critical part of the diagnosis of Tourette's involves having multiple tics. A tic . . . is an involuntary movement or vocalization. There are simple motor tics in which only one body part may move. . . . There are complex motor tics in which almost any movement that the human body can make has been reported. . . The same holds true of vocalizations. . . Other facets of the tic disorder include what is called obsessive, compulsive behavior. . . . A compulsion differs from a tic in that it has usually some sense of dread or anxiety about not performing a specific act. . . . There is usually the ability to suppress. . . . Sometimes . . . people are able to suppress milder tics for

3. The proceedings had been scheduled for the previous day, but, upon learning that Martorano was still receiving medication, Judge Hannum *ordered counsel to go to the prison* and have the doctor who prescribed the medication, the nurse who administered it and the warden present the following day. (A263-73)

> . . . hours, a number of hours, throughout the entire school day or work day. (A487-90; *see also* A508)

While the symptoms of this inherited disease wax and wane, by arbitrary convention, it can only be present if at least one symptom appears between the ages of 2 and 20 and if at least one of the tics is a vocalization. (A490-91, 499, 509, 529-31)

In Martorano's case, Dr. Rickler observed and was told about several symptoms: mumbling to himself, whistling, loud exhalation, turning his head to the right, stuttering, asymmetric blinking, touching his genitals, touching a particular spot on a wall, pacing, moving his leg repetitively, nail biting, drumming on a wall, brushing his teeth, hand washing and changing his clothing. (A491-98, 504-05, 516-17, 524-28, 532-33) The pervasiveness of these symptoms over the years, the history of tics in other family members, as well as the difficulty in executing asymmetric movements, severely undercuts the government's theory that Martorano is faking this unusual illness. (A504-05) That the government doctors observed ticking only when Martorano was aware of their presence is explainable by the fact that stress can make tics worse. (A508-09) The lesser frequency of tics prior to 1985 could have been due to drug abuse. (A535-36)

On the issue of Martorano's mental state, the defense first called DR. THOMAS O'ROURKE, an expert in forensic psychology. (A540-42) Dr. O'Rourke had administered several types of tests, including intelligence tests (Wechsler Adult Intelligence Scale, Peabody, and Raven's Progressive Matrix); memory tests (Bender-Gestalt, Berry Test of Motor Integration, and the Laseque Test for Malingering); and personality tests (Minnesota Multiphasic Personality Inventory ("MMPI"), Rorschach, and Draw-a-Person). (A543)

Based on the test results, interviews, prior reports, samples of Martorano's correspondence, videotapes supplied by the government, and the raw test data provided by the government doctors, Dr. O'Rourke concluded that Martorano suffers from an adjustment disorder with anxiety and emotion disturbance; a mixed personality disorder with histrionic, dependent, gran-

diose and anxious tendencies;[4] has low average intelligence (16th percentile on the Wechsler); has a grade 4.4 reading level; and has a learning disability probably from organic brain impairment. (A543-44, 554, 559, 562, 567)

The §4205 study's conclusion of malingering was based on the erroneous assumption that Martorano's score on the MMPI could be indicative of nothing else when it could be the result of lack of comprehension or attention.[5] (A546, 556, 567-68) The battery of tests given during the §4205 study was too limited to discount this possibility. (A558-59, 587, 590) In addition, standardized test results can be adversely affected by stress and depression—factors which Dr. O'Rourke sought to eliminate. (A547-48, 557-58, 568)

The last defense witness was DR. DANIEL SCHWARTZ, a forensic psychiatrist. (A601-04) He had examined Martorano in 1984, 1986, and 1988. (A605) Based on these examinations, reports prepared by other doctors, the videotapes, the government's version of the offense and transcripts of prior court proceedings, Dr. Schwartz made the same diagnosis as Dr. O'Rourke. (A605-612) The adjustment disorder, which has improved over time, began when Martorano was sentenced to life without the possibility of parole. (A608) The personality disorder, on the other hand, has been with him since childhood and has manifested itself in a lack of self-esteem which he covered with boasting.[6] This illness has also improved since Martorano's incarceration. (A609-12)

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4. These disorders are treatable and would not cause criminal behavior if Martorano were to be released. Indeed, while there is a very real question about his competence at the time of his plea, his condition has improved during his incarceration and would probably continue to improve were he to receive a determinate sentence. (A560-61, 565, 566, 569, 593-96; *see also* Schwartz at A617-18, 625, 629-32)

5. Dr. O'Rourke sought to control for lack of comprehension or attention lapses by personally reading the questions, allowing Martorano to ask for clarification, and asking whether Martorano had understood particular questions. (A548-50)

6. On one of the tapes Martorano is heard boasting about making a drug deal in China. Another time, he spoke about taking over Haiti. (A610-11)

b. The Government's Witnesses

On the issue of whether Martorano was faking Tourette's Syndrome, the government relied primarily on DR. KEVIN PUZIO, a neurologist employed by U.S.M.C., Springfield (A432-33), who had seen only "a dozen" cases of Tourette's and had never diagnosed the disease. (A440) After speaking to, and examining Martorano, but without watching any of the videotapes, Dr. Puzio concluded that he suffered from a motor tic disorder which could not be defined as Tourette's because it had not begun before the age of 15—a conclusion which he reached without speaking to anyone who could provide childhood history.[7] (A437-39, 443, 446, 453)

The government's principal witness about Martorano's mental status was WILLIAM CARTER, a psychology intern at U.S.M.C., Springfield, to whom "the primary responsibility for conducting the assessments" of Martorano had been delegated. (A384-85, 399-401) Based on the test results and observations made during interviews and in living situations, Carter determined that Martorano was malingering "as to his level of intellectual functioning." (A401-03)

Since he had made no effort to personalize the administration or to ascertain whether Martorano understood the instructions—and in fact had delegated the administration of the MMPI, the BETA, and the Graham-Kendall to his secretary (A406-07, 418, 421)—Carter could not discount the possibility that Martorano's performance was related to an inability to understand the directions or the questions. (A405-11, 418-19) Indeed, he admitted that the Graham-Kendall indicated the presence of brain damage affecting memeory which, in turn, would affect the results of the BETA intelligence test. (A423-24)

Carter also concluded that Martorano did not suffer from Tourette's Syndrome because, on the videotapes supplied by the government and when interacting with other inmates, Martorano did not display any tics. *(Id.)* He admitted, however, that he was not an expert in the field, had never before seen a

7. Dr. Puzio described this illness as consisting of "habit spasms," a term which Dr. Rickler later testified was an archaic term for a tic. (A506) Dr. Rickler also testified that the requirement of onset by age 15 is no longer the commonly accepted standard.

patient with Tourette's and had only "sporadically" read literature on this disease. (A425, 430, 432) Indeed, he was not even aware of many of the commonly associated symptoms. (*Compare* A426-29 *with* A 441-42, 488-89)

The government also called GARY GEORGE, Chief of Psychology Services at U.S.M.C., Springfield. (A367-68) Dr. George spoke to Martorano on only three occasions: he did the initial screening, obtained some mental status background, and was consulted about a gagging problem. (A368) He also observed Martorano in the cafeteria once (A369), and reviewed one videotape for 25 minutes. (A373-74)

Dr. George reaffirmed the conclusion of the report previously submitted to the sentencing court that Martorano was malingering. (A371) This was based on a comparison of test scores with observed behavior and MMPI results indicating that Martorano "basically had all symptoms."[8] (A371) Dr. George found no explanation for why Martorano was anxious, depressed and displayed tics during interviews, but seemed animated and relaxed in other situations. (A372) Although he concluded that Martorano did not suffer form Tourette's Syndrome, Dr. George readily admitted that he was "not an expert" in that disease. (A377) Indeed, he did not know its causes and was unfamiliar with many of its symptoms. He had only seen three or four cases in 15 years, had never read any literature on the subject, and had never treated a Tourette's patient. (A380-81)

The government's last medical witness was DR. MATTHEW QUINONES, the prison psychiatrist who had treated Martorano in 1986 and 1987. (A462-63) He diagnosed the Tourette's Syndrome based on observations of motor tics during the entire 10 months of their relationship and on reports of episodes of vacalization. (A464-65, 470) Dr. Quinones also determined that Martorano has "borderline" intelligence, is "easily influenced by others", and has poor memory. (A471-72) His low intelligence and bad memory would result in poor scores on standardized tests. (A472-73)

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8. Dr. George admitted that the MMPI results could also indicate that Martorano had not understood the directions or the questions (A387). He did not explain why that possibility was rejected, especially since no verbal memory and comprehension tests had been administered. (A389)

5. Judge Hannum's Previously Prepared Opinion

Without allowing argument and without recessing, Judge Hannum delivered his opinion. (A635) He accepted without explanation the written reports finding Martorano to be a malingerer. In so doing, Judge Hannum made no reference to the fact that a hearing had been conducted, let alone to any of the testimony adduced. (A638-642)

6. The Second Life Sentence—April 27, 1988

Counsel argued that reimposition of the nonparolable life sentence was inappropriate for a number of reasons. *First,* the medical evidence indicated that, since his original sentencing, Martorano "has improved substantially, improved in terms of maturation, improved in terms of his ability to deal with the real world, with the world outside prison in a law-abiding manner." (A655) A sentence which would give him the hope of release would further that rehabilitation. (A656)

Second, if defendants who plead guilty are given maximum sentences, the incentive to plead could be eradicated. (A656-57) *Third,* Martorano is a first offender, who has never been given the opportunity "to grow up, to mature....to show that [he] can learn from his mistakes." (A657-58) *Fourth,* at the time of the instant offenses, Martorano was heavily drug dependent. (A658) *Fifth,* it is undisputed that Martorano's intelligence is very limited and he has severe learning disabilities—factors which clearly impacted on his ability to commit an offense of the magnitude described by the government.[9] Indeed, the video tapes clearly indicated that Martorano basically did what the agents taught him and told him to do. (A659)

Sixth, Martorano has mental problems which caused him to profoundly need to be accepted, to be important. These problems, however, have lessened over time and will continue to lessen if properly treated. (A661) *Seventh,* the magnitude of the original sentence and the government's claims about the enormity of the offense caused Martorano to serve much of the first four years under the harshest possible conditions. (A662-63)

Eighth, the medical testimony established that the sentence

9. While the government doctors believed that Martorano's IQ was not as low as the test results showed, they never disputed the defense characterization of Martorano as a man with a very low IQ and severe learning disabilities.

which allowed for no hope of release worsened Martorano's mental condition—a deterioration which was reversed when the decision on the first appeal gave him hope. (A664) *Ninth,* had Martorano committed these offenses after the new sentencing guidelines went into effect, he would be facing a sentence in the range of 10 to 24 years. (A664)

Conceding that Martorano is not the "model of mental health" (A672), the prosecutor asked only for a "very substantial" sentence. (A667-673) That, however, was not what Judge Hannum wanted to hear and, thus, the prosecutor was admonished for failing to mention cooperation. (A673-74)

This subject occupied the next half hour, with counsel arguing that the lack of cooperation was an inappropriate criterion for sentencing (A681, 682), where (a) there was no evidence that Martorano could ever have offered useful cooperation (A678); (b) he had been incarcerated since 1983 and any information he provided would be stale (A678-79, 680); (c) if the government's claims of violence in this case were true, he would endanger himself (A679-80); and (d) with his history of mental problems, he would not be a useful witness. (A680-81) Judge Hannum, however, made clear that Martorano's failure to cooperate was the paramount consideration in his sentencing and reimposed a life sentence.[10] (A690-91)

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10. THE COURT: Assistance and cooperation. It seems to me this would have occurred to somebody. It really would—the people this man must know. It might take guts to speak up but that might help him, might it not? (A675)....

THE COURT: But you avoid this point of *some manifestation of courage, of manliness.* These things are enormously important. (A679; emphasis supplied)....

THE COURT: One other thing, this is a matter of tremendous concern to everyone present, one of the things that sometimes happens is that counsel, where there might be some conflicts of interest or it might be that some counsel or some person that you represent or potentially represent might put you in a position where you don't want to do that. That I would understand. (A685-86) . . .

THE COURT: Just a moment. Did it occur to you ever there might be some advantage to this man to open up avenues by a contact by yourself with Mr. Pichini? Did that ever occur to you?....Have you done that? Either you have or you haven't?

MISS YARIS: Have I spoken to Mr. Pichini, no....

THE COURT: I say, why can't you contact him?

MISS YARIS: Your Honor, you are asking me to violate the attorney-client privilege. (A686-88)

D. The Circuit's Factual Inaccuracies

Notwithstanding the very potent evidence that Judge Hannum had failed to even consider the arguments raised by Martorano, the Court of Appeals affirmed. Since, however, the law clearly supported Martorano's positions, the Court of Appeals supplied a new set of facts—one which was without any basis in the record and had not been advocated by either party. These errors, which necessarily affected the legal conclusions reached by the Court of Appeals, are discussed seriatim:

1. The opinion stated that four of Martorano's five claims supporting his plea withdrawal motion were rejected upon his first appeal. (pp. 2a & n.1, 4a, 10a—11a &n.3) *This is wrong* because the record was substantially developed through a motion to withdraw his plea filed subsequent to the first appeal.

2. The opinion stated that Martorano's initial recusal motion was based on the fact that Judge Hannum "testified, after Martorano's initial sentencing, at the tax evasion trial of Martorano's then counsel." (p. 3a) *This is wrong,* for the testimony occurred on July 20, 1984, while Martorano's sentencing did not take place until August 20, 1984.

3. The opinion stated that Martorano's recusal motion was also based on the claim that "the district judge held an improper bias against Martorano because one of Martorano's co-defendants [Rankin] had accused the district judge of physically assaulting the codefendant during the co-defendant's separate criminal trial." (p. 3a) *This is wrong* because, on appeal, Martorano pursued only his claim that the events of this case gave rise to an "appearance of impropriety" requiring recusal pursuant to 28 U.S.C. §455, and did not argue, pursuant to 28 U.S.C. §144, that the judge was actually biased.

4. *The foregoing statement is also wrong* because Rankin's allegations were not the basis for the motion. Rather, Martorano alleged that the reasonable man might view Judge Hannum's continued presiding over the proceedings involving Martorano as improper in view of the Chief Judge's disqualification of Judge Hannum from Rankin's narcotics retrial (third ground) and Judge Hannum's testimony against Rankin at Rankin's perjury trial (fourth ground).

5. The opinion stated that the propriety of Judge Hannum's

presiding over the post-remand proceedings was not raised until Martorano "was about to be resentenced after his first appeal to this Court."(p. 7a) *This is wrong* because remand to a different judge was sought in the first appeal, but the Court of Appeals declined to exercise its supervisory power to order the relief since Martorano could file a recusal motion. *(See p. 28a, n.1)*

6. The opinion stated that "[b]ecause Judge Hannum would necessarily be called as a witness on [Rankin's perjury] charges, a different judge was assigned to preside at Rankin's retrial in the narcotics case." (p.9a) *This is wrong* because Rankin's narcotics retrial was reassigned on September 5, 1986, 18 months before Rankin's indictment for perjury.

7. The opinion stated that Martorano's recusal motion which accompanied the plea withdrawal motion was based "on the assertion that [Martorano] had been under the impression that Simone had reached a private agreement with Judge Hannum that a lesser sentence would be imposed." (p. 9a) *This is wrong* because the motion was based on the reasonable person's belief that Judge Hannum's recollection of the events would taint his ruling on Martorano's perception of the events.

8. The opinion followed a statement that the district judge held a hearing "at which eight mental health professionals testified as to their assessments of [Martorano's] intelligence and psychological well-being" with the statement that "Judge Hannum specifically found that Martorano did not suffer from a mental deficiency or mental illness." (p.10a) This juxtapositioning *is wrong* because it suggests that Judge Hannum's finding was based on the facts adduced at the hearing when he ignored the fact that the hearing was held. (A32-33)

9. The opinion held that Judge Hannum did not abuse his discretion by denying the three recusal motions." (pp. 12a, 20a) *This is wrong* because there were four recusal motions made.

10. The opinion, citing to the district court's opinion (A 58-59), declined to address the recusal motion based on Judge Hannum's disqualification from Rankin's narcotics retrial, which it believed to have been made pursuant to 28 U.S.C. §144, because it was procedurally defective. (p. 12 & n.5) *This is wrong* because, while this motion was made under both §455 and §144, only the §455 issue was raised on appeal.

11. The opinion stated that "[s]ince the facts [relating to the

recusal motions] were available at the initial sentencing proceeding, the issue of laches may be dispositive." (p. 12) *This is wrong* because, only the facts of the first recusal motion were available. All other events (Judge Hannum's disqualification from Rankin's retrial, the plea withdrawal motion in this case and Rankin's perjury indictment) did not occur until well after the initial sentencing.

12. In the context of discussing the recusal motion based on Judge Hannum's testimony at Simone's trial, the opinion stated that "Judge Hannum pointed out that he was not subpoenaed to testify until after he had imposed the [first] sentence. Thus these events could not have affected his initial choice of [sentence]"(p. 14a) *This is wrong* because Judge Hannum's testimony took place in July of 1984 and Martorano was sentenced in August of 1984.

13. *The foregoing statement is also wrong* because Judge Hannum did not make the finding attributed to him.

14. The opinion stated that Martorano "further argues that the district court abused its discretion by mandating the maximum sentence." (pp. 15a-16a, 17a, & n.7) *This is wrong* because petitioner's argument was that the abuse, or rather abdication, of discretion was the imposition of this sentence without consideration of mitigating factors.

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS DENIED PETITIONER DUE PROCESS OF LAW WHEN IT BASED ITS OPINION ON FACTS WHICH WERE NOT SUPPORTED BY THE RECORD OR URGED BY EITHER PARTY.

A. A Defendant Is Entitled To Due Process On Appeal

The 5th Amendment commands that "[n]o person shall ... be deprived of ... liberty ... without due process of law." As this Court has recognized:

> No general respect for, nor adherence to, the law as a whole can be expected without judicial recognition of the paramount need for prompt, eminently fair and sober

> criminal law procedures. The methods we employ in the enforcement of our criminal law have aptly been called the measures by which the quality of our civilization may be judged.

Coppedge v. United States, 369 U.S. 438, 449 (1962) (footnote omitted). While " '[t]here is, of course, strong temptation to relax rigid standards when it seems the only way to sustain convictions of evildoers,' " especially "where the conviction is for a narcotics violation at a time when the country is engaged in a 'war on drugs,' " "a courtroom is not the proper place in which to fight such a 'war.' A defendant charged with a narcotics violation is presumed like every other defendant to be innocent until proven guilty beyond a reasonable doubt after a fair trial." *United States v. Edwardo-Franco,* __ F.2d __ (2d Cir. Nov. 17, 1989), *quoting, Krulewitch v. United States,* 336 U.S. 440, 457 (1949) (Jackson, J., concurring). "However heinous the crimes of which the defendants stand accused, and however despicable their reputations, they are no less entitled to the protections of the Constitution...." *United States v. Ruggiero,* 846 F.2d 117, 129 (2d Cir. 1988) (Lumbard, J., dissenting).

Petitioner does not question the seriousness of the drug problem plaguing this nation; nor does he suggest that he deserves anything but oppobrium. However, the panel of the Court of Appeals which affirmed his conviction appears to have succumbed to the temptation caused by what it characterized as the "scourge of drugs" (p.19a) and applied an unarticulated exception to the Constitution for persons convicted of narcotics offenses. No other rational explanation can justify its reliance on facts not supported by the record or urged by either party; misstatement of petitioner's legal arguments and failure to address anything but those misstatements; patently incorrect application of the procedural bars of laches and law of the case; ignoring the universally accepted rule that 28 U.S.C. §455(a) does not require actual bias; and reliance on findings which the District Court made without any regard for the evidence presented by petitioner.

While the due process clause does not guarantee that every decision reached will be factual or just, it does guarantee "that a decision will be reached by processes that are fair." *United States v. Wallace,* 448 F. Supp. 164, 166 (E.D. Va. 1978). *See*

also Walters v. National Association of Radiation Survivors, 473 U.S. 305, 321 (1985), *quoting, Matthews v. Eldridge,* 424 U.S. 319, 344 (1976). Included in the right to fair process is the "right to be heard before being condemned to suffer greivous loss of any kind." *Joint Anti-Fascist Committee v. McGrath,* 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring). This hearing, moreover, must be granted "at a meaningful time and *in a meaningful manner." Armstrong v. Manzo,* 380 U.S. 545, 552 (1965) (emphasis supplied).

Had a trial court done what the Court of Appeals did in this case, Martorano would have been entitled to a reversal of his conviction for a hearing predicated on an imagined version of the facts is no hearing at all:

> in commenting upon the evidence, *the [trial] judge may not assume the role of a witness.* He may analyze and dissect the evidence, but *he may not distort it or add to it.* In expressing an opinion on the evidence, *deductions and theories not warranted by the evidence should be studiously avoided.* The judge may not charge the jury upon a supposed or conjectural state of facts of which no evidence has been offered.

United States v. Blevins, 555 F.2d 1236, 1240 (5th Cir.), *cert. denied,* 434 U.S. 1016 (1977) (citations omitted; emphasis supplied). *Cf., United States v. Tucker,* 404 U.S. 443 (1972) *and Townsend v. Burke,* 334 U.S. 736, 740-741 (1948) (a sentence founded on misinformation of constitutional magnitude is subject to review); *United States v. McCord,* 466 F.2d 17, 19 (2d Cir. 1972) (a sentence within legal limits is not ordinarily reviewable, but the procedures resulting in its imposition must meet due process requirements).

Although it does not appear that any court has addressed the issue of the limits to the liberties which an appellate court may take with the record and the law, the principles applicable at trial should apply with no less force on appeal. The starting point in this analysis is that "[a] direct appeal from a criminal conviction by a federal district court to a court of appeals is a fundamental right of due process," *Catches v. United States,* 582 F.2d 453, 458 (8th Cir. 1978), *citing, Coppedge v. United States, supra,* 369 U.S. at 441, and, therefore, may not be

abridged. *Chapman v. United States,* 469 F.2d 634, 636 (5th Cir. 1972, *citing, Nance v. United States,* 422 F.2d 590 (7th Cir. 1970). *Cf., Evitts v. Lucey,* 469 U.S. 387 (1985) (due process guarantees a defendant the effective assistance of counsel on his appeal as of right); *United States v. Johnson,* 732 F.2d 379, 381-82 (4th Cir.), *cert denied,* 469 U.S. 1033 (1984) (delay in processing an appeal may rise to a due process violation).

Nor can there be any question that Martorano's right to a meaningful hearing of his appeal was abridged. Short of failing to provide the opportunity to be heard at all, a court cannot render the opportunity to be heard less meaningful than when it ignores what it hears and molds the facts and the law to fit a predetermined result. It is not enough that established procedures appear to have been followed: judicial supervision of the administration of justice implies a duty of maintaining the standards which these procedures were established to reach. *McNabb v. United States,* 318 U.S. 784 (1942). *See also United States v. Blasco,* 702 F.2d 1315, 1329 (11th Cir. 1983).

As the D.C. Circuit held when requested to do what the Third Circuit did in this case *sua sponte,*

> *An appellate court . . . cannot decide a question of fact upon evidence which is not in the record. [It] cannot make findings of fact different from the allegations in the pleadings* and affidavits . . . below; not can [it] consider [a piece of evidence] which was not before the trial court and was not in the record [on appeal]....These *cases, like all others, must be decided upon the records made in the trial court.*

Carr v. Corning, 182 F.2d 14, 21 (D.C. Cir. 1950) (emphasis supplied).

Just as the Courts of Appeals do not expect the District Courts to police themselves, this Court cannot expect the Courts of Appeals to police themselves. Accordingly, certiorari should be granted in this case and the Court should limit the often repeated adage that "tough cases make bad law": due process requires that all cases should make good law, or at least should make that law in a manner which comports with constitutional standards.

B. Without The Circuit's Factual And Legal Misstatements, Martorano Would Have Prevailed

The holding of the Court of Appeals with respect to virtually every issue raised by Martorano was based on a flawed underpinning, factual, legal, or both.

1. The Recusal Motions

Both in the District Court and on appeal, Martorano argued that Judge Hannum should have recused himself because of four factors gave rise to an appearance of impropriety: (a) his testimony as a character witness at the trial of Martorano's attorney; (b) Martorano's belief that Judge Hannum had indicated to Simone that he would impose a sentence at the low end of the permissible range; (c) the Chief Judge's disqualification of Judge Hannum from the narcotics retrial of codefendant Rankin; and (d) Judge Hannum's anticipated testimony for the government at Rankin's perjury trial. The Court of Appeals opinion incorrectly focused on two principles: laches (Martorano's failure to raise these issues at the first sentencing), and the factual showing necessary for recusal.

First, laches is inapplicable here because the mandate of 28 U.S.C. §455(a) that a judge avoid the appearance of impropriety is self-executing and, thus, does not require a motion to create an appealable issue. *United States v. Kelly*, __ F.2d __ (11th Cir., Sept. 29, 1989); *United States v. Sciarra*, 851 F.2d 621, 635 (3d Cir. 1988); *United States v. Sibla*, 624 F.2d 864, 868 (9th Cir. 1980); *Idaho v. Freeman*, 507 F. Supp. 706 (D. Idaho 1981). However, even if that doctrine were applicable, the Circuit's application of it is wrong since only one of the four grounds for recusal—Judge Hannum's testimony at Simone's trial—occurred prior to Martorano's initial sentencing.[11]

11. It is doubtful if laches could apply even to the one ground which could have been raised at the original sentencing since the appearance of impropriety resulting from Judge Hannum's testimony on behalf of Simone was renewed by the new proceedings. Judge Hannum was in "a no win situation" before the resentencing. If he resentenced Martorano to life, his actions would be subject to the inference that he did so to preserve the appearance that he had not previously tried to rehabilitate his reputation. On the other hand, if he chose to impose a lesser sentence, his actions would be subject to the inference that the original sentence had been the product of his concern about his reputation. Thus, the argument for recusal is stronger with respect to the resentencing than it would have been prior to the original proceedings.

Second, the Circuit confused the standards for recusal under §455(a)—whether a reasonable person would "harbor doubts concerning the judge's impartiality," *United States v. Dalfonso*, 707 F.2d 757, 760 (3d Cir. 1983); *see also United States v. Torkington*, 874 F.2d 1441, 1446 (11th Cir. 1989); *Matter of Beverly Hills Bancorp*, 752 F.2d 1334, 1341 (9th Cir. 1984)—and for recusal under §§144 and 455(b)—whether the judge is "bias[ed]-in-fact," *United States v. Sciarra, supra*, 851 F.2d at 635. While it correctly described the §455(a) standard (p. 12a), the Circuit proceeded to hold incorrectly that there were no "objective facts" to substantiate the motion based on Judge Hannum's testimony (pp. 14a, 15a), and no showing that the judge harbored any ill will towards Rankin as a result of his disqualification from Rankin's retrial or that he transferred this ill will to Martorano (p. 15a). *See United States v. Kelly, supra*, __ F.2d at __; *Chitimacha Tribe of Louisiana v. Harry L. Laws Co.*, 690 F.2d 1157, 1165 (5th Cir. 1982), *cert. denied*, 469 U.S. 814 (1983) (a §455(a) motion does not depend on actual bias or prejudice, but applies to any facts that might give rise to an appearance of impropriety).[12]

If the Circuit's requirement of documented bias becomes the standard under §455(a), then there will no longer be any difference between it and the other two sections. Yet, it is apparent from their very wording that Congress intended to accomplish two distinct goals. By §§144 and 455(b), it intended to assure all litigants that their cases will not be heard by a judge with a demonstrable bias. By §455(a), it intended to assure both litigants and the public, that "[j]udges' robes [are] as spotless as

12. Recusal under §455(a) is mandated whenever a reasonable layperson might believe that a judge's conduct is improper, whether or not it is actually improper. *Cf., Pepsico, Inc. v. McMillen*, 764 F.2d 458 (7th Cir. 1985) (through a "headhunter", judge had inadvertently contacted the law firms representing opposing parties); *Hall v. Small Business Administration*, 695 F.2d 175 (5th Cir. 1983) (judge's law clerk had been a member of plaintiff class and accepted employment with plaintiffs' counsel); *United States v. Nobel*, 696 F.2d 231 (3d Cir. 1982) (judge was a stockholder in corporate victim); *United States v. Jonnet*, 620 F. Supp. 684 (W.D.Pa. 1985) (defendant's repeated, albeit patently false, allegations of impropriety created an appearance of impropriety which warranted recusal); *Church of Scientology of California v. Cooper*, 495 F. Supp. 455, 461 (C.D. Calif., 1980) (recusal warranted even in the face of "the Court's firm recollection and conviction that the allegations are false" because of appearance of impropriety).

their actual conduct." *Hall v. Small Business Administration, supra,* 695 F.2d at 176. *See also Liljeberg v. Health Services Acquisition Corp.,* __ U.S. __, 108 S.Ct. 2194, 2205 (1988); *United States v. Columbia Broadcasting System, Inc.,* 497 F.2d 107, 109 (5th Cir. 1974) ("the protection of the integrity and dignity of the judicial process from any hint or appearance of bias is the palladium of our judicial system"); H.R. Rep. 1453, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. Cong. Code & Admin. News 6351, 6354-55. In other words, "speculation" by the reasonable man that "something is rotten in the [District Court]," Shakespeare, *Hamlet,* Act I, scene 4, is precisely what §455(a) is designed to prevent.

In sum, the Circuit incorrectly found no merit in

a. *the motion to recuse based on Judge Hannum's testimony at Simone's trial* because (i) it misanalyzed the applicability of the doctrine of laches; (ii) it erroneously believed that the reasonable man would not find any appearance of impropriety in the absence of a proven bias; (iii) it wrongly placed the testimony after Martorano's initial sentencing; and (iv) it mistakenly believed that the district court had made a finding as to the sequence described in (iii).

b. *the recusal motion based on the impropriety of Judge Hannum ruling on a plea withdrawal motion involving a claim that Martorano believed that there was an off-the-record agreement about his sentence* because (i) it believed that the basis for this motion was Martorano's understanding, rather the reasonable man's belief that Judge Hannum would take his own knowledge into account; and (ii) it incorrectly believed that this motion had been made pursuant to §144 only.

c. *the motion to recuse based on Judge Hannum's disqualification from the retrial of Rankin's narcotics case* because (i) it misapplied of the doctrine of laches; (ii) it erroneously believed that the reasonable man would require actual bias; (iii) it wrongly placed this event prior to Martorano's initial sentencing.

d. *the motion to recuse based on Judge Hannum's anticipated testimony against Rankin at his perjury trial* because (i) it incorrectly believed that this had been the basis for the Judge's dis-

qualification from Rankin's retrial and treated the two motions as one; (ii) it mistakenly believed that Martorano claimed that Judge Hannum's alleged assault of Rankin demonstrated an actual bias against Martorano under §144; (iii) it erroneously believed that Martorano claimed the assault, rather than Judge Hannum's testimony as a government witness, was the basis for the motion;[13] and (iv) it wrongly placed this event prior to Martorano's initial sentencing.

2. The Plea Withdrawal Motion

Both in the District Court and on appeal, Martorano argued that five factors combined to make plea withdrawal "fair and just:"[14] (a) his assertions of innocence of some of the charges;[15] (b) his failure to unders-

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13. During the pendency of the petition for reargument in this case, the defendants in *United States v. Wilson* (E.D.Pa.Cr.No. 88-282) moved to have Judge Hannum recuse himself on the ground that his testimony at Rankin's perjury trial would create an appearance of impropriety by virtue of the fact that one of Mr. Rankin's codefendants in that case was represented by the same attorney as one of the defendants in the *Wilson* case. The government joined in that application and Judge Hannum recused himself. Although the Circuit was informed of the government's position in the *Wilson* case (*see* letter of May 26, 1989, supplementing petition for rehearing), it nonetheless refused to reconsider its holding in this case.

14. Prior to sentence, a court may permit withdrawal of the plea "upon a showing of the defendant of any fair and just reason." Rule 32(d), Fed.R.Crim.P. *See also Kercheval v. United States*, 274 U.S. 220, 224 (1927). Although there is no absolute right to withdraw a plea, in order to protect the right to trial by jury, *United States v. Strauss*, 563 F.2d 127, 130 (4th Cir. 1977), such motions "should be liberally construed in favor of the accused and should be granted freely." *Government of Virgin Islands v. Berry*, 631 F.2d 214, 219 (3d Cir. 1980), *cert. denied*, 425 U.S. 995 (1981).

15. These assertions were based on his intellectual and educational inability to run a $75 million per year drug empire. (*See* pp. 6-8, *supra*).

tand the plea proceedings;[16] (c) the very realistic possibility

16. The minutes of the guilty plea reveal that all parties, except Martorano, used polysyllabic words and legal jargon:

> THE COURT: Do you further understand that by pleading guilty you *relinquish* your right to a jury trial and that you *waive your privilege against compulsory self-incrimination and that you waive your right to confront your accusers?* . . .
>
> *MR. PICHINI: [21 U.S.C.* §846 requires] that two or more people in some way or manner *positively or tacitly* came to a *mutual understanding* to try to *accomplish* the unlawful plan. . . .
>
> THE COURT: Is your plea *voluntary?* . . . Did anyone promise any *reward, reduction* in sentence or other *inducement?* And before you anwer that question the court will *relate* to you the following: . . . plea *bargaining* is *specifically approved* by the court and that you may *truthfully inform* the court of any plea *negotiations* without the *slightest* fear of *incurring disapproval* of the court. . . .
>
> THE COURT: And further if this be the fact, do you *affirmatively state* that no out of court promise, *representation, agreement or understanding required* you to *respond untruthfully* or *contrary* to the terms *thereof* in the court *plea reception proceedings;* correct? (A118-26; emphasis supplied)

While this terminology should be comprehended by the average defendant, Martorano's verbal ability is far below average; his comprehension was no better than it would have been if the proceedings had been conducted in Sanskrit. As he states, "if Mr. Simone had not helped me out with signals, I would not have gotten through the plea at all. (A68; *see also* Simone: A70-71)

This Court insists that courts employ the "utmost solicitude" in inquiring whether the defendant understands what the plea involves. *Boykin v. Alabama,* 395 U.S. 238, 243-244 (1969). This principle is echoed by Rule 11(c), Fed.R.Crim.P. Thus, in *United States v. Masthers,* 539 F.2d 721, 723-24 & n.16 (D.C. Cir. 1976), where the defendant's IQ was in the "mildly retarded" range, his reading was at the second grade level, and his responses to the allocution were monosyllabic, the Circuit held that a hearing as to whether he understood the consequences of his guilty plea was required. *See also Matusiak v. Kelly,* 786 F.2d 536 (2d Cir.), *cert. dism'd,* __ U.S. __, 107 S.Ct. 248 (1986).

that he was under the influence of drugs at the plea allocution;[17] (d) his belief that he would receive a lenient sentence due to his attorney's relationship with Judge Hannum;[18] and (e) Simone's failure to provide the effective assistance of counsel.[19] The Circuit refused to consider all but the fourth of these arguments because they had been raised in the first appeal.

17. Martorano avers that "[on] the day I pled guilty, I was very confused, probably because I had been using either quaaludes or marijuana." (A68) This is supported by Simone, who described Martorano's behavior as not "totally normal" (A70) and Martorano's cousin, who observed that "[h]is speech that day was also unusual; he spoke in a very slow monotone, pausing between every word as if his thoughts were drifting." (A75, 78-79)

A remarkably similar case is *Lopez v. United States*, 439 F.2d 997 (9th Cir. 1971), where the defendant alleged that, due to drug ingestion, he was:

> docile and more prone to the suggestions put to [him] by [his attorney] . . . was unable to fully appreciate [his] acts respecting the deal put to [him] by [his attorney] and the deception [they] practiced upon the court regarding the voluntariness of [his] plea, which was in fact voluntary only upon the condition that [he] receive no more than ten years.

Id. at 999. The Court noted that Lopez' mental condition was a "serious claim" which, together with the defense attorney's alleged promise, required an evidentiary hearing. *Id.* at 1000.

18. Whether Martorano's belief about the sentence that would be imposed was well-founded or merely a figment of an over-active imagination, it obliterated his minimal ability to make a knowing and intelligent choice regarding his plea. *See Boykin v. Alabama, supra*, 395 U.S. 238. On point is *United States v. Hawthorne*, 502 F.2d 1183 (3d Cir. 1974), where the defendant, as had Martorano, disavowed the existence of any off-the-record promises or inducements. *Id.* at 1184. After a 10-year sentence had been imposed, he told the court that his attorney had promised him five years. Relying on the proposition "that a guilty plea delivered when there has been misrepresentation by counsel and reasonable reliance thereon constitutes 'manifest injustice,' *id.* at 1186, the court concluded that, if Hawthorne *"reasonably believed* that the statements of his counsel meant that arrangements had been made with respect to the length of sentence to be imposed," relief would be required. *Id.* at 1187. *See also United States v. Sanderson*, 595 F.2d 1021 (5th Cir. 1979); *United States v. Marzgliano*, 588 F.2d 395 (3d Cir. 1978).

19. Where there is a conflict of interest, no more than a showing of possible prejudice is necessary. *United States v. DeFalco*, 644 F.2d 132, 135 (3d Cir. 1979). *See also Holloway v. Arkansas*, 433 U.S. 475, 490-91 (1978). In

The Circuit's belief that its prior decision was the "law of the case" and, thus, precluded the relief sought was a misinterpretation of that doctrine. It is not enough that the relief sought be the same: the *precise question,* both legally and fatually, must have been decided for the doctrine to come into play. *Evans v. Buchanan,* 465 F. Supp. 445, 448 (D.Del. 1979). If a subsequent proceeding produces "substantially different evidence," the question cannot be said to have been decided. *Barber v. International Brotherhood of Boilermakers,* 841 F.2d 1067, 1072 (11th Cir. 1988). *See also United States v. Robinson,* 690 F.2d 869 (11th Cir. 1982) (appellate ruling on legality of arrest not dispositive since evidentiary hearings on remand resulted in new facts).

These principles make clear that the law of the case doctrine was improperly applied by the Court of Appeals. In his first appeal, Martorano sought to withdraw his plea, based on the record then before the Court of Appeals, alleging that (a) the consequences had not been fully explained; (b) the duty to explain had been improperly delegated to the prosecutor; and (c) the factual basis was inadequate. After remand, he sought the same relief, but his theory was substantially different.

More significantly, since his 1985 appeal raised the plea withdrawal issue without it having been raised in the District Court, the facts before the first panel were limited to the brief plea and sentence colloquies and the presentence report. In contrast, the post-remand panel had before it upwards of 300 pages of affidavits and testimony from attorneys, medical experts, and family members who observed Martorano at the plea, subsequent court proceedings, as well as in natural and controll-

DeFalco, defense counsel was under indictment and had entered a guilty plea before the judge from whose judgment his client's appeal was being taken. The Circuit held that this "tangential involvement" constituted a conflict of interest. 644 F.2d at 136. In the instant case, the conflict was more acute since Simone was continuing to represent his client before the judge to whom he owed a personal favor that reasonable people might think could only be repaid by sacrificing his client. This might well have restrained that "complete and exuberant presentation" that is a "basic ingredient of the adversary system." *Id. See also Government of the Virgin Islands v. Zepp,* 748 F.2d 125 (3d Cir. 1984).

ed settings. (A62-175, 190-215, 362-649) While the panel could have found these facts to be insufficient to justify plea withdrawal, it could not simply ignore their existence.

In sum, the Circuit incorrectly found no merit in Martorano's claim that withdrawal of his plea was "fair and just" as a result of

a. *his assertions of innocence of the most serious charges* because it improperly applied the law of the case doctrine;
b. *his lack of understanding of the plea proceedings* because (i) it improperly applied the law of the case doctrine even in the face of, *inter alia,* new affidavits of several attorneys stating that before, during, and after the plea proceedings, Martorano could not understand normal courtroom parlance; and (ii) it incorrectly believed that the District Court's finding that Martorano did not suffer from any mental disease or defect was entitled to deference notwithstanding the fact that it was made without the benefit of the evidence elicited by Martorano;
c. *the likelihood that he was under the influence of drugs at the plea* because it improperly applied the law of the case doctrine even in the face of new documentation that Martorano's drug abuse continued past his plea and that his responses on the day of his plea were consistent with drug use;
d. *Martorano's belief that the court had promised him a lenient sentence* because it erroneously held that Martorano's "tendency to reshape the world into the world of his desiring" did not "rise[ ] to the level of mental illness" (p. 11a)—a holding predicated on Judge Hannum's findings which were predicated not on the evidence, but on Judge Hannum's tendency to reshape the record into the record of his desiring;
e. *the fact that he was denied the effective assistance of counsel, because counsel neither removed himself from the case nor sought the recusal of the court despite a conflict of interest* because it improperly applied the law of the case doctrine even though the first panel declined to address this issue on procedural, not substantive, grounds and believed that the problem

would be cured on remand.[20] (*See* p. 28a, n.1)

3. The Infirmities In The Second Sentencing Proceedings

Martorano argued that the life sentence without any possibility of parole or good time imposed at the re-sentencing is unlawful for three reasons: (a) as applied to him, it violated the 8th Amendment[21]; (b) because Judge Hannum's ruling on the medical issues was made without regard to the evidentiary hearing, the sentence was imposed without due process[22], and (c)

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20. It is perplexing that the Court of Appeals held that the failure of predecessor counsel to seek the judge's recusal waived the issue (p. 12a), while denying Martorano the right to test whether this waiver constituted ineffective assistance.

21. In *Solem v. Helm*, 463 U.S. 277 (1983), this Court struck down as excessive under the 8th Amendment a nonparolable life sentence imposed under a habitual criminal statute. In so doing, it held that the 8th Amendment prohibits all sentences "that are disproportionate to the crime committed," but "no penalty is *per se* constitutional." 463 U.S. at 384, 290. One of the factors to be considered in the proportionality analysis is the relationship between the gravity of the offense and the harshness of the penalty. *Id.* at 290-291.

Martorano pleaded guilty to a number of serious drug offenses which Congress has clearly ranked as much graver crimes than had the legislature in *Solem*. But these offenses cannot be considered without reference to the offender since "the concept of individualized sentencing is firmly entrenched in our present jurisprudence." *United States v. Barker*, 771 F.2d 1362, 1365 (9th Cir. 1985). *See also United States v. Fulbright*, 804 F.2d 847, 853 (5th Cir. 1986); LaFave & Scott, HANDBOOK ON CRIMINAL LAW §5 at 25 (1972). Yet, the sentence imposed upon Martorano failed to take into account any of his personal characteristics.

22. Since sentencing is a critical stage in a criminal proceeding, a defendant remains wrapped in his right to due process, *Mempa v. Rhay*, 389 U.S. 128 (1967), and may question the procedure leading to the imposition of his sentence. *Gardner v. Florida*, 430 U.S. 349, 358 (1977) (plurality op.). As this Court held in *Dorszynski v. United States*, 418 U.S. 424, 443 (1984),

> [r]ather than an unjustified incursion into the province of the sentencing judge ["careful scrutiny of the *judicial process* by which the particular punishment was determined"] is, on the contrary, a necessary incident of what has always been appropriate appellate review of criminal cases. (emphasis in original)

Due process is unquestionably violated when the defendant is given the opportunity to present what he pleases, but his presentation is totally ignored.

since Judge Hannum did not offer any reasons based in fact for this draconian sentence, its imposition constituted an abdication of discretion.[23] The Circuit's rejection of these claims was

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United States ex rel. Welch v. Lane, 738 F.2d 863, 866 (7th Cir. 1984) (the defendant must be given *a meaningful* opportunity to rebut information). Indeed, "the sentencing judge *is required* to consider all mitigating and aggravating circumstances involved," *United States v. Wright*, 799 F.2d 423, 426 (8th Cir. 1986) (emphasis supplied), *citing, Williams v. Oklahoma*, 358 U.S. 576, 585 (1959), and *"is required* to assure [him]self that the information upon which he relies when fixing sentence is reliable and accurate." *United States v. Lee*, 818 F.2d 1052, 1055 (2d Cir. 1987) (emphasis supplied).

23. Although the duration of a pre-Guidelines sentence is generally non-appealable, *Dorszynski v. United States, supra*, 418 U.S. at 431, appellate courts retain a general power to remand where a sentence reveals an abuse of, or a complete failure to exercise, discretion by the District Court. *See, e.g., United States v. Brown*, 382 F.2d 52, 53 (3d Cir. 1967). In this case, Judge Hannum's abdication of discretion manifested itself in his failure to take into account any of the information presented in mitigation of sentence, or to even acknowledge that such information has been presented. It was also manifested in the imposition of a sentence of ultimate severity on a defendant who was far from the most serious of all federal drug offenders, and who had pleaded guilty.

Initially, Judge Hannum failed to justify the imposition of a draconian sentence. Although furnishing reasons for the choice of a sentence has long been recommended, *see*, ABA Project on Minimum Standards for Criminal Justice, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES §5.6 (Approved Draft 1968); *Woosley v. United States*, 478 F.2d 139, 147 (8th Cir. 1973), as of 1987, Congress has required that reasons be stated for every sentence imposed. 18 U.S.C. §3553(c). Absent compliance, vacatur of the sentence is required. Even before its effective date, §3553(c) was held to require resentencing of a defendant who received a particularly long sentence without any explanation. *United States v. Golomb*, 754 F.2d 86, 91 (2d Cir. 1985).

Likewise, an exercise of discretion required the court to reconcile the imposition of the maximum term with the fact that Martorano pleaded guilty. The plea bargain is a valid and, "highly desirable" component of our criminal justice system. *Santobello v. New York*, 404 U.S. 257, 261 (1971). A sentence discount is routinely expected in return for allowing "judges and prosecutors alike [to] conserve vital and scarce resources." *Blackledge v. Allison*, 431 U.S. 63, 71 (1977). This Court has recognized that, "absent the possibility or certainty that the plea will result in a lesser penalty," "the defendant might never plead guilty." *Brady v. United States*, 397 U.S. 742, 751 (1970). *See also United States v. Romano*, 825 F.2d 725 (2d Cir. 1987).

based on improper reliance on Judge Hannum's findings and misunderstanding of the claims made.

Thus, the Court of Appeals incorrectly found no merit in Martorano's claim that

a. *the imposition of a non-parolable life sentence upon this particular defendant violated the 8th Amendment* because it (i) viewed this challenge as one to the constitututionality of the sentence generally (p. 16a), rather than as applied to this defendant; and (ii) it accepted without the requisite question the findings of the District Court regarding Martorano's mental health, even though those findings failed to mention the hearing, let alone the evidence elicited at it by the defense.

b. *he did not receive due process because Judge Hannum failed to consider mitigating evidence* because (i) it relied on the principles that a defendant must have the opportunity to present mitigating evidence and that a sentence may not be based on materially false information, without reference to Martorano's claim that his opportunity to present information and challenge the government's allegations was not meaningful because Judge Hannum had written his opinion before the defense made its presentation; and (ii) because it approved the District Court's reliance on Martorano's failure to cooperate as an aggravating factor indicating a lack of "manliness" (A678), without reference to the fact that valid explanations, which make such reliance unacceptable, had been offered.[24]

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24. Quoting *United States v. Heubel*, 864 F.2d 1104 (3d Cir. 1989)—a decision which had not yet been released—the Circuit stated that, when the defendant does not invoke the 5th Amendment, failure to cooperate can be an aggravating factor "assuming another valid explanation is not given." (p. 18a n.8) What the Circuit did not mention is Martorano's explanation that (i) his associates were all convicted and, thus, he had no useful information to provide (A678); (ii) he has been incarcerated since 1983 and, therefore, any information he might have had is stale (A678-79); (iii) if he actually had the information the government believes he has, his life would be jeopadized by cooperating (A679-80); (iv) the evidence of his mental problems would negate his usefulness because it would be available as impeachment material (A680-81)—who would believe a person who, in the words of the Circuit, has a "tendency to reshape the world into the world of his desiring?" (p. 11 n.3)

While there is a dearth of cases regarding what a "valid explanation" within the meaning of *Heubel* might be, it is clear beyond peradventure that

c. *the imposition of sentence without consideration of mitigating evidence constituted an abdication of discretion* because it believed that Martorano's claim was that the District Court had abused its discretion merely be imposing a draconian sentence (pp. 15a-16a, 17a n.7), rather than by doing so without considering mitigating evidence.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Third Circuit.

Respectfully submitted,

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Martorano's third reason—fear for his life—is "valid." *See, e.g., Roberts v. United States*, 445 U.S. 552, 559 (1980); *United States v. Stratton*, 820 F.2d 562, 564-65 (2d Cir. 1987). And, it is most respectfully submitted that, while the other reasons may be without precedent, they are equally valid, or at least deserve to have their validity determined, not ignored.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-1348

UNITED STATES OF AMERICA

v.

MARTORANO, GEORGE,
a/k/a COWBOY

GEORGE MARTORANO,
Appellant

On Appeal from the United States District Court
for the Eastern of Pennsylvania
(D.C. Criminal No. 83-00314-01)

Argued October 5, 1988

Before: HIGGINBOTHAM, MANSMANN and
GREENBERG, *Circuit Judges.*

(Filed January 11, 1989)

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OPINION OF THE COURT

A. LEON HIGGINBOTHAM, JR., *Circuit Judge.*

In this case, the appellant, George Martorano ("Martorano"), appeals from a judgment of conviction entered after resentencing upon a plea of guilty to all 19 counts of a narcotics indictment, including one count of managing a continuing criminal enterprise. Martorano also challenges the sentence of life imprisonment without possibility of parole that was imposed on him both at the first sentencing proceeding and on resentencing. Martorano makes many arguments concerning issues that have already been addressed by an earlier decision of this Court,[1] and therefore we do not discuss them here. In his

1. *See United States v. Martorano*, 782 F.2d 1029 (3d. Cir. 1986)(unpublished opinion). For an elaboration of the duplication of issues, see note 3 *infra*. While we would not normally cite an unpublished opinion, since such an opinion has no precedential value, *see* Internal Operating Procedures of the United States Court of Appeals for the Third Circuit, Ch. 5(F)(1), we make reference to this opinion here simply to explain that several of the issues raised by the appellant have already been decided by this Court in his prior appeal.

remaining arguments, Martorano argues that the sentence imposed violated the Eighth Amendment. He also argues that the district judge abused his discretion in not recusing himself because of the alleged appearance of impropriety given by the district judge's having testified, after Martorano's initial sentencing, at the tax evasion trial of Martorano's then counsel. Martorano further alleges that the district judge held an improper bias against Martorano because one of Martorano's codefendants had accused the district judge of physically assaulting the co-defendant during the co-defendant's separate criminal trial.

We hold that a sentence of life imprisonment without possibility of parole does not violate the Eighth Amendment where defendant pled guilty to charges of masterminding a conspiracy that distributed drugs in wholesale quantities. We also hold that the district court did not abuse his discretion by denying the motions to recuse. Accordingly, we will affirm the judgment of conviction and sentence.

I.

Martorano pled guilty to charges that he had been a wholesale distributor of large amounts of cocaine, methamphetamine, methaqualone, and marijuana. The indictment also alleged that Martorano had conspired to purchase large amounts of heroin for distribution in the Philadelphia area. According to the indictment, the drugs sold yearly by Martorano's organization were worth millions of dollars. The indictment further charged that Martorano had supervised a number of other people in the drug enterprise. Martorano was alleged to have made a substantial income through this drug network and to have invested his profits in legitimate businesses.

Because Martorano pled guilty, these allegations have not been tested by a trial. However, the government's proof offers included 106 tape-recorded conversations and the physical evidence that the government had seized -- $130,000, 3,000 pounds of marijuana, two kilograms of heroin, and 300,000 fake quaaludes. At his plea hearing, after consulting with his counsel, Martorano agreed that the prosecutor's summary of the facts was accurate, Joint Appendix ("Jt. App.") at 136. It was read into the record as the factual basis for his plea. Jt. App. 127-134. At the first sentencing proceeding, Martorano only contested three of the facts in the government's sentencing memorandum that went to the defendant's guilt: (1) whether Martorano was a career criminal, (2) whether the street value of the drugs allegedly sold yearly by the enterprise was $75,000,000 (as the government alleged) or some lesser number of millions, and (3) whether the government, rather than Martorano, had supplied the heroin used in the sting operation that led to Martorano's arrest. Jt. App. at 158-160.

Martorano makes one additional factual allegation before us: his counsel contends that Martorano is of such subnormal intelligence that he could not have committed the acts charged. This contention has already been rejected by a panel of this Court, *United States v. Martorano*, No. 84-1568 (3d Cir., January 6, 1986) at 6, and so is not properly before us now. Therefore, what is chiefly before us in this case is whether the sentence imposed for these crimes violated either the Eighth Amendment or the Due Process Clause of the Fifth Amendment, or whether the district court's denial of motions to recuse invalidated the resentencing process.

Because it bears on the validity of the denial of the recusal motions, we will examine the procedural history of this case in some detail. Martorano retained

Robert Simone, Esquire ("Simone") as his trial counsel. Prior to the date set for Martorano's trial, Simone was indicted in the Eastern District of Pennsylvania on tax evasion charges. As a result of Simone's indictment, the district judge held a hearing on March 15, 1984 at which he advised Martorano that his counsel had been indicted and that consequently a conflict of interest might arise between Martorano and Simone during the course of Martorano's trial. Judge Hannum asked Martorano thirteen questions which explored virtually every aspect of a conflict of interest. *See* Jt App. at 20-22. In response to these questions, Martorano indicated that he understood the risks inherent in continued representation by Simone, but stated that he wished for Simone to continue to represent him, thus waiving the question of a conflict of interest.

On June 4, 1984, Martorano pled guilty to all counts of the indictment. At this time, the prosecutor advised Martorano that he faced a maximum possible sentence of life imprisonment without possibility of parole, and that the mandatory minimum sentence for the offenses in question was ten years' imprisonment without possibility of parole. Jt. App. at 122-123. Judge Hannum asked Martorano if he understood that the maximum possible penalty was life imprisonment without possibility of parole and the forfeiture of drug profits, and Martorano replied that he did. Jt. App. at 123. The district court then accepted Martorano's guilty plea. Because Martorano had not also been advised that a fine could be imposed, he was brought back into court on June 19, 1984, and advised that his sentence could include a fine. Martorano was then given an opportunity to withdraw his guilty plea, but declined to do so.

In July 1984, one month after the plea hearing, but before sentencing, Judge Hannum testified pursuant

to a subpoena in Simone's tax evasion case. Judge Hannum gave only mild and general character testimony on Simone's behalf. *United States v. Simone*, No. 85-5800, Transcript of proceeding (E.D.Pa., 1986). Simone was acquitted of the charges. At the time of Simone's trial, the *Daily News*, a Philadelphia newspaper, criticized Hannum's testimony as "highly unusual" due to Simone's counsel's failure to comply with Rule 9 of the Rules of Civil Procedure for the Eastern District of Pennsylvania. Rule 9 requires that a party who wishes to subpoena a federal judge to give character testimony submit a request for a subpoena to the Eastern District, which must be approved by the chief judge of the Eastern District and of two other district judges before a subpoena should issue. After Martorano's sentencing, the *Philadelphia Magazine* reported federal prosecutors' critical comments that federal judges should not give character testimony. *See* Jt. App. at 56.

A few weeks later, on September 20, 1984, Judge Hannum sentenced Martorano to a nonparolable life sentence. Both Martorano and his counsel argued at the sentencing proceeding that mitigating factors were present, and Martorano's counsel argued that the defendant should receive the minimum sentence. Martorano's counsel also put on evidence concerning Martorano's alleged mental problems. His counsel did not argue, however, that the presentence report contained factual inaccuracies. *See* Jt. App. at 158-63 (defense presentations of mitigating evidence). Nor did Martorano's counsel then argue, as his current counsel does on this appeal, that Judge Hannum erred by not withdrawing from the case after his testimony.

Martorano now argues that because a newspaper had criticized Judge Hannum for testifying when the party calling him did not comply with local Rule 9 of the

Eastern District of Pennsylvania, Judge Hannum attempted to refute that alleged implication that he was partial to Martorano's attorney by imposing a harsh sentence on one of that counsel's clients. All the facts on the basis of which the defendant now argues that Judge Hannum should have disqualified himself were available to the defendant at the time of his initial sentencing proceeding, but were not raised by him until over a year later, when he was about to be resentenced after his first appeal to this Court.

After his initial sentencing, Martorano appealed his sentence to this court for the first time. *See United States v. Martorano*, No. 84-1568 (3d Cir., January 6, 1986). The Court found that the district court had failed to comply with certain requirements of Fed. R. Crim. P. 32 at the sentencing hearing. Rule 32(a)(1)(A) and (c)(3)(A) requires that the court "determine that the defendant and his counsel have had the opportunity to read and discuss the presentence investigation report . . . " and that the defendant and his counsel have an opportunity to comment on the report and, if they wish, contest its validity through testimony or other evidence. Because the record did not reflect such a determination and such an opportunity, this Court vacated the sentence and required that the district court had to hold a new hearing and comply, on the record, with the requirements of Rule 32. *Martorano*, at 4-5.

For the first time, on remand, Martorano's current counsel filed a motion to recuse Judge Hannum from the resentencing proceedings based on Judge Hannum's having testified under subpoena as a character witness for Martorano's former counsel. Judge Hannum denied the recusal motion. He based this denial on his findings of fact about the sequence of events. Jt. App. at 55-56. Among other facts, Judge Hannum noted that, on April 24, 1984, six weeks before

Martorano pled guilty, Simone had already pointed out to the district court the date on which he was scheduled to commence his tax evasion trial. Martorano thus pled guilty to all charges against him *after* Simone had advised the district court that he had been indicted on the tax evasion charges and *after* Martorano had already waived any conflicts of interest that might arise as a result of his counsel being indicted on these charges. *See* Jt. App. at 20-22. Judge Hannum received the subpoena requiring him to testify at Simone's trial after Martorano had pled guilty in the face of being informed that, if he did so, he might receive the maximum sentence of life imprisonment without possibility of parole. Finally, Judge Hannum noted that the second, more severe newspaper criticism of his testifying occurred *after* Judge Hannum had first sentenced Martorano to life imprisonment without the possibility of parole. Judge Hannum therefore could not have been influenced by the second article in his original choice of Martorano's sentence. Judge Hannum ruled that these facts would not lead a reasonable person to question his impartiality, or to conclude that he had violated any canon or rule by testifying for Simone. He also ruled that only "speculation" would lead a reasonable person to conclude that he had imposed a harsh sentence to rehabilitate the alleged damage to his reputation assertedly caused by the first newspaper story. Judge Hannum therefore found no basis for recusing himself under 28 U.S.C. § 455(a). Jt. App. 56-57.

Judge Hannum also denied a motion that he recuse himself for personal bias under 28 U.S.C. § 144 as Martorano did not attach the required party affidavit alleging personal bias, and because Martorano attorney's affidavit did not set forth facts that would lead a reasonable person to conclude that Judge Hannum was biased against the defendant. Jt. App. at 58-59.

Judge Hannum also held that assertions made by Kevin Rankin, Martorano's co-defendant, did not warrant his recusal from Martorano's resentencing. Judge Hannum had presided over Rankin's first trial on narcotics charges arising out of the same drug importation scheme that Martorano pled guilty to running. After Rankin's convictions were reversed on appeal, Rankin sought to have Judge Hannum disqualified from presiding at his retrial. In support of his motion, Rankin stated in an affidavit that Judge Hannum had struck him, battered him, and chased him around the courtroom during the first trial. These charges gave rise to criminal charges against Rankin for making false statements and obstructing justice. *See* Jt. App. at 346-51, 360-61. Because Judge Hannum would necessarily be called as a witness on these charges, a different judge was assigned to preside at Rankin's retrial in the narcotics case. Judge Hannum held that a reasonable person could not conclude that reassignment of the *Rankin* case would affect his ability to be impartial with respect to Martorano. Jt. App. at 57.

The district court denied Martorano's motion to withdraw his guilty plea. Jt. App. at 186-87. Before addressing the merits of the motion to withdraw, Judge Hannum denied a renewed motion by Martorano that the judge remove himself from the case. Martorano based his motion on the assertion that he had been under the impression that Simone had reached an private agreement with Judge Hannum that a lesser sentence would be imposed. In denying this motion, Judge Hannum noted that there was no factual support for this allegation of an "off-the-record deal." Jt. App. at 185.

After denying Martorano's motion to withdraw his guilty plea, Judge Hannum again sentenced Martorano to life imprisonment without possibility of parole and

ordered the forfeiture of some real property and other assets.

Because the defense contended that Martorano was mentally ill and of subnormal intelligence, the district court ordered that Martorano should undergo a study pursuant to 18 U.S.C. § 4205(c)(1982).[2] Accordingly, after a three month period, the district court conducted two hearings to determine whether a modification of Martorano's sentence was appropriate. One of these constituted a full evidentiary hearing on Martorano's mental condition at which eight mental health professionals testified as to their assessments of his intelligence and psychological well-being. Jt. App. at 362-635. Judge Hannum specifically found that Martorano did not suffer from a mental deficiency or mental illness, but rather that he had attempted to feign these problems. Jt. App. at 638, 641-42. The court then affirmed its original sentence. Jt. App. at 690. This appeal followed.

II.

We note initially that we decline to again address the numerous arguments made by the defense counsel

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2. 18 U.S.C. § 4205(c) provides that

> If the court desires more detailed information as a basis for determining the sentence to be imposed, the court may commit the defendant to the custody of the Attorney General . . . for a study as described in subsection (d) of this section. . . . After receiving such reports and recommendations, the court may in its discretion: (1) place the offender on probation as authorized by section 3651; or (2) affirm the sentence of imprisonment originally imposed, or reduce the sentence of imprisonment, and commit the offender under any applicable provision of law. . . .

18 U.S.C. § 4205(c)(1982).

that go to issues already decided by this Court.[3] Accordingly, the issues remaining before us are whether Judge Hannum abused his discretion by denying the motions that he disqualify himself and

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3. This Court has already held that the defendant's argument that he was not competent to make his plea was meritless. *Martorano*, at 6. The Court also rejected as meritless Martorano's argument that he entered his guilty plea without understanding what he was doing, that a factual basis for the plea was not established, and that the requirements of F.R. Crim. P. 11, which requires a plea colloquy between the judge and the defendant, had been breached. *Martorano* at 7. In addition, the Court found that Martorano's claim of ineffective assistance of counsel as to the plea was not raised in the district court and therefore could not be addressed on direct appeal. *Martorano*, at 6 (citing *United States v. Garcia*, 544 F.2d 681 n.1 (3d Cir. 1976)). These issues are discussed at Appellant's Brief, II.A., II.B., II.C., and II.E.

In addition, we decline to address at length the defense counsel's contention that Martorano's guilty plea was made unknowingly due to Martorano's alleged belief that his then counsel and Judge Hannum had made a private deal to give him no more than the minimum sentence. Appellant's Brief at 33-36. Judge Hannum found this allegation to be without factual support, and the defense counsel do not seriously contend that such a deal had in fact been made. *See* Appellant's Brief at 36. If the numerous and extensive psychological examinations of the defendant demonstrate little else, they do show that Martorano suffers even more than the rest of the world from the tendency to reshape the world into the world of his desiring. *See, e.g.*, Appellant's brief at 35 n.18 [summarizing evidence of this problem]; *Report of Albert Levitt*, Jt. App. at 81-82; *Report of Kenneth Kool, M.D.*, Jt. App. at 87, 88, 89, 90, 93. Unless it rises to the level of mental illness, as here it does not, the justice system is not responsible for a defendant's ability to enhance reality through fantasy. To rule otherwise would be to give criminal defendants complete control over whether a plea stood or not, post-sentence, based solely on whether they were willing to allege that they *imagined* that they would receive a lesser sentence due to an imagined off-the-record deal -- and despite their disavowals of any private agreement in the Rule 11 colloquys. A criminal justice system that put such a premium on ameliorative fantasy would obviously be untenable.

whether Martorano's sentence violated the Eighth Amendment.

A.

We hold that Judge Hannum did not abuse his discretion by denying the three recusal motions.[4] We shall address two of these motions in turn.[5] With regards to each of them, we note that we would hesitate to find that the district judge improperly denied the recusal motions when they were only made for the first time on resentencing. Since the facts were available at the initial sentencing proceeding, the issue of laches may be dispositive. But, since there are independent reasons to find that Judge Hannum did not abuse his discretion in denying the motions, we discuss them here.

1.

Martorano claims that Judge Hannum abused his discretion by denying a recusal motion based on his testimony as a character witness at Simone's tax evasion trial. The test for recusal is whether the judge's impartiality might be questioned by a reasonable person. *Edelstein v. Wilentz*, 812 F.2d 128, 131 (3d Cir. 1987); *United States v. Dalfonso*, 707 F.2d 757, 760 (3d Cir. 1983). Martorano makes two arguments

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4. In holding that we find that appellant has failed to meet the level of proof required for recusal, we do not mean to imply that we approve of Judge Hannum's testifying without a full and complete compliance with the applicable rule of his court, Local Rule 9 of the Eastern District of Pennsylvania.

5. Judge Hannum denied the second recusal motion, which sought recusal for personal bias under 28 U.S.C. § 144, because Martorano did not attach the required party affidavit alleging personal bias. Jt. App. at 58-59. As it was defective when made, we do not further address it here.

that Judge Hannum's testimony created the appearance of such impropriety.

The first is the largely unsubstantiated assertion that Judge Hannum volunteered to testify at Simone's tax evasion trial. The basis of this assertion is an exchange between Judge Hannum and Simone at a scheduling conference several months before the putative date of Simone's trial. When Simone noted that Simone's trial couldn't take place July 9th if Simone was then busy with Martorano's trial, Judge Hannum observed, "Well, it might involve this judge. Do you follow me?" Jt. App. at 34. Simone replied that he did. *Id.*

This exchange is what defendant calls it, "murky". Appellant's Brief at 18. Defendant asserts that this exchange "suggests that Judge Hannum may have volunteered to testify for Simone. At the very least, it was clear that he was anything but a reluctant witness and had agreed to testify long before the subpoena was actually served." *Id.* Martorano goes on to claim that "the later issuance of a subpoena was no more than a device to lend an appearance of compulsion to the character testimony. If true, this would be a gross impropriety. Thus, the mere possibility that this might have happened certainly rises to the level of an appearance of impropriety." *Id.*

We do not draw the same inferences from the brief, ambiguous exchange as does the defendant. Since Simone already knew the date of his trial at the time of the scheduling conference, his attorney may have already contacted those witnesses whom he expected to call at trial, under the subpoena power or otherwise. Judge Hannum may have already known that he might be called through this normal aspect of Simone's counsel's trial preparation. Alternatively, Judge Hannum might have been a potential prosecution witness: why he thought that he might be involved in

Simone's trial simply isn't clear. Martorano has made no effort to prove Judge Hannum actually did volunteer, but simply asserts that it is a "mere possibility". Simone's counsel presumably knows whether Judge Hannum volunteered to testify or not. Martorano could have sought to get his views by affidavit or otherwise. Motions to recuse under 18 U.S.C. § 455(a) must rest on the kind of objective facts that a reasonable person would use to evaluate whether an appearance of impropriety had been created, not on "possibilities" and unsubstantiated allegations. Martorano has not put forth this type of objective evidence here.

Martorano's second argument that Judge Hannum should have recused himself is that the failure of Simone's attorney to comply with the requirements of Rule 9 created an appearance of impropriety, and that Judge Hannum improperly acted to counter this alleged appearance of impropriety by imposing a stiff sentence. Martorano alleges that this alleged inverse favoritism was itself an impropriety. As Judge Hannum pointed out in denying this motion, the second newspaper article, the only one critical of Judge Hannum personally for testifying, appeared *after* he had first sentenced Martorano to life imprisonment without the possibility of parole. As noted above, Judge Hannum pointed out that he was not subpoened to testify until after he had first imposed the sentence. Thus these events could not have affected his initial choice of the nonparolable sentence, which he then selected again at resentencing. As Judge Hannum noted, only "speculation" would lead a reasonable person to conclude, absent any evidence, that he had reimposed the same sentence not for the factors that underlay his original choice, but to rehabilitate the damage allegedly done to his reputation by the newspaper stories. Jt. App. at 56-57. Again, since the

test for recusal is a reasonable person one, a movant must supply some objective facts that support his position, not mere speculation.

2.

Martorano also moved that Judge Hannum recuse himself on resentencing based on the assertions that one of Martorano's co-defendants, Kevin Rankin, made regarding Judge Hannum's alleged misconduct in a separate trial. As discussed above, Rankin alleged, among other things, that Judge Hannum had physically abused him. The defendant argues that any annoyance that Judge Hannum may have felt against Rankin as a result of these allegations, and Judge Hannum's consequent removal from Rankin's trial, would be transferred to Martorano, since Martorano and Rankin were close associates in the drug importation business. As Judge Hannum pointed out in denying the motion to recuse on that basis, Martorano offered no evidence from which it could be inferred that Judge Hannum harbored ill will against Rankin, or that Judge Hannum would transfer any feelings that he had about Rankin to Martorano. Jt. App. at 57 n. 7. Judge Hannum therefore found that a reasonable person would not conclude that Rankin's accusations and the consequent reassignment of the Rankin case would affect his ability to be impartial over Martorano's case. *Id.* So do we. By training and inclination, judges meet media criticism of their actions with robust insensitivity.

B.

Martorano argues that his sentence of life imprisonment without possibility of parole violated the Eighth Amendment's prohibition against cruel and unusual punishment and the Due Process Clause of the Fifth Amendment. He further argues that the district court abused its discretion by mandating the

maximum sentence. We find all these contentions to be without merit.

Martorano's Eighth Amendment claim has already come before this Court, *United States v. Martorano*, 782 F.2d 1029 (1986), but the Court withheld judgment, since it remanded Martorano's case for resentencing. We find unpersuasive Martorano's argument that "the 30 months which have passed have allowed Martorano to develop substantial documentation of the factors which make his sentence disproportional to his particular offense and circumstances." Appellant's Brief at 41.

The Eighth Amendment does proscribe punishment "grossly disproportionate to the severity of the crime." *Ingraham v. Wright*, 430 U.S. 651, 667 (1977)(citing *Weems v. United States*, 217 U.S. 349 (1910)). The leading case striking a sentence of other than of the death penalty for gross disproportionality is *Solem v. Helm*, 463 U.S. 277 (1983). In *Solem*, the Court struck down a nonparolable life sentence under South Dakota's habitual criminal statute for uttering a bad check, the defendant's seventh nonviolent felony. The Court stated that "'[o]utside the context of capital punishment, *successful* challenges to the proportionality of particular sentences [will be] exceedingly rare.'" *Solem*, 463 U.S. at 289-90 (quoting *Rummel v. Estelle*, 445 U.S. 263, 272 (1980))(emphasis the Court's). Martorano has provided little new documentation on this appeal and none that demonstrates that his case is one of these rare successful challenges.

Solem held that Eighth Amendment proportionality analysis should be guided by the following factors: (1) the gravity of the offense and the harshness of the penalty; (2) the sentences imposed on other criminals in the same jurisdiction; and (3) the sentences imposed for the commission of the same

crime in other jurisdictions. 463 U.S. at 292. These factors suggest that Martorano's sentence was not grossly disproportionate. Martorano committed an extremely grave offense, the importation of thousands of pounds of drugs. While the penalty is severe, it is not harsh, given the havoc that the drug trade wreaks on our nation. A wholesale importer bears a greater responsibility for this havoc than even a small-scale pusher who has been repeatedly convicted, since a kingpin's large scale importation of foreign drugs keeps many pushers in business and wholesale importers are essential to the drug trade in its current, large proportions in a way that pushers are not. Nor was Martorano's sentence incommensurate with sentences imposed on other wholesale drug dealers.[6] Martorano does not discuss these factors, and he has in fact introduced little if any "substantial documentation." Martorano's sentence does not violate the Eighth Amendment.

We are equally unpersuaded by Martorano's argument that Judge Hannum violated Martorano's due process rights by imposing a life sentence without possibility of parole.[7] Due process may require that a

6. Life sentences without possibility of parole were imposed and upheld in *United States v. Milburn*, 836 F.2d 419, 421-22 (8th Cir. 1988); *United States v. Valenzuela*, 646 F.2d 352, 354 (9th Cir. 1980); *United States v. Jeffers*, 532 F.2d 1101 (7th Cir. 1976), modified on other grounds, 432 U.S. 137 (1977); *United States v. Sperling*, 506 F.2d 1323 (2d Cir. 1974), *cert. denied*, 420 U.S. 962 (1975).

7. We decline to address Martorano's argument that Judge Hannum abused his discretion by imposing the nonparolable life sentence. The Supreme Court has stated, "once it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end." *Dorszynski v. United States*, 418 U.S. 424, 431 (1974). That is the case here. While we do not state categorically that no mode of imposing sentence could constitute an abuse of discretion, we note

convicted defendant have an opportunity to present evidence of extenuating circumstances. *United States ex rel. Welch*, 738 F.2d 863, 865 (7th Cir. 1984). Martorano had that opportunity. Similarly, due process requires that a convicted person not be sentenced based on "materially untrue" assumptions or "misinformation." *Townsend v. Burke*, 334 U.S. 736, 741 (1948). However, a district court judge's discretion in sentencing is "largely unlimited either as to the kind of information he may consider, or the source from which it may come." *See United States v. Tucker*, 404 U.S. 443, 446 (1972). In the absence of error or clear misinformation,[8] a sentencing judge may

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that sentences that are within the statutory range that conform to the dictates of the Eighth Amendment and the Due Process Clause will usually not constitute an abuse of discretion. *See United States v. Pugliese*, 805 F.2d 1117, 1122 (2d Cir. 1986)("a sentence imposed by a district court within statutory limits, and not illegal, or based on inaccurate information, or procedures that offend due process will not be interfered with on appeal"). For the reasons discussed in our examination of the Eighth Amendment and Due Process issues, that is so here.

8. This Court has recently held that where a defendant specifically invokes his Fifth Amendment privilege against incrimination in a timely manner, a sentencing court may not use his failure to waive that right and cooperate with the authorities as negative evidence to penalize him in deciding upon the appropriate sentence. *United States v. Heubel*, No. 88-3548 (circulating to the Court), trans. at 15. But the Court went on to specifically exempt from its holding cases where "a defendant does not invoke his or her Fifth Amendment privilege . . . assuming another valid explanation is not given . . ." and to state that in these cases it might be appropriate "for a sentencing court to consider [a defendant's] failure to cooperate with the authorities as evidence that he or she is not ready to show contrition and begin the rehabilitative process." Trans. at 14.

Martorano's case fits in the Court's exception rather than the rule. While the district court gave Martorano an opportunity to cooperate, and specifically relied on his absence of cooperation in imposing the sentence that he did at resentencing, Martorano did

consider all circumstances that shed light on a convicted person's background, history and behavior. At the initial sentencing hearing, Judge Hannum made specific findings on the factor underlying his sentence, *see* Jt. App. at 171 (the danger to society posed by drugs). At the resentencing proceeding, Judge Hannum again noted that the need to protect society from the scourge of drugs and indicated that Martorano's unwillingness to indicate repentance by cooperating underlay his sentencing decision. *See* Jt. App. at 674-85.[9] The district court does not deny a defendant due process when it relies on uncontested aggravating factors in setting a sentence, particularly where, as here, the district court makes specific findings that the defendant's evidence on the issue of the asserted mitigating factors is not credible. Jt. App. at 171.

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not invoke his Fifth Amendment right in any way in electing not to cooperate. *See* Jt. App. at 674-89 (discussion at the resentencing hearing as to whether Martorano would be willing to cooperate and as to why he would not). The district court was therefore at liberty to consider Martorano's failure to cooperate as evidence of a lack of contrition in imposing sentence.

9. Martorano also argues that the court should have taken account of the fact that he pled guilty in selecting a sentence. Guilty pleas usually result in a lesser sentence, but they need not. Here Martorano pled guilty one week after the prosecution made its detailed proof offers available. His plea was almost certainly at least in part a result of an assessment of his chances of acquittal of this -- and other -- crimes. In return for his plea of guilty, Martorano received the government's assurance that it would not prosecute him for any other offenses committed during the time period of the offenses to which he pled guilty. At the time the deal was consummated, neither Martorano nor the government knew what the other was giving up. The nature of our system, which separates sentencing from the guilt determination, means that a judge may always choose a sentence that exceeds what a jury, a federal prosecutor or defense counsel had hoped would be imposed. Such a normal divergence is not cause for vacating a sentence.

III.

We find that the district court did not abuse his discretion by denying the three recusal motions. The defendant's sentence does not violate the Eighth Amendment or the Due Process Clause of the Fifth Amendment. Accordingly, the judgement of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

(A.O. U.S. Courts. G.M.C. Printing, Phila., Pa. 215-568-4264)

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-1348

UNITED STATES OF AMERICA,

v.

MARTORANO, GEORGE,
a/k/a COWBOY
GEORGE MARTORANO,

Appellant.

(D.C. Criminal No. 83-00314-01)

SUR PETITION FOR REHEARING

Present: GIBBONS, *Chief Judge,* HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, and NYGAARD, *Circuit Judges.*

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for

rehearing, the petition for rehearing by the panel and the Court in banc, is denied.

BY THE COURT,
s/ A Leon Huggenbotham
Circuit Judge

Dated: SEP 20 1989

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-1568

UNITED STATES OF AMERICA

v.

MARTORANO, GEORGE, aka COWBOY
GEORGE MARTORANO, Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Criminal No. 83-00314-01)

Before: Seitz, Weis and Rosenn, *Circuit Judges.*
Argued on November 4, 1985
(Filed January 6, 1986)

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OPINION OF THE COURT

PER CURIAM.

George Martorano, defendant, appeals from a life sentence without parole imposed after a guilty plea.

Defendant was indicted on 19 counts, including a count charging him with conducting a continuing criminal enterprise in violation of 21 U.S.C. §848. The indictment alleged that defendant was a wholesale distributor of large amounts of controlled substances. It also alleged that defendant conspired to purchase large amounts of heroin for distribution in the Philadelphia area. The indictment charged that the value of the drugs sold ran into the millions of dollars.

Defendant retained Robert Simone as his trial counsel. Prior to the trial date Simone was indicted for violations of the federal tax laws. Thereafter the district court in the present case held a hearing to explain to defendant in detail the risks inherent in representation by an indicted attorney. In response to the judge's questions, the defendant said he did not wish to be represented by a different attorney.

At the request of defense counsel, an order was entered directing that defendant be examined by a psychiatrist and psychologist. The doctors found defendant competent to stand trial.

Subsequently, the government filed a detailed trial memorandum setting forth its version of the facts. A week later defendant, at a hearing, changed his plea to guilty on all counts. At that time the government read into the record a detailed factual recitation which formed the basis for its charges. The government also offered 106 tape-recorded conversations as well as $130,000 that had been seized, along with substantial amounts of drugs. The district court provided defendant with an opportunity to review the factual statement with counsel and to consult with the government's attorney on the matter. After con-

sultation with his counsel, defendant agreed that the prosecutor's summary of the facts was accurate.

Before the plea was ultimately accepted the prosecutor advised defendant that he faced a maximum sentence of life imprisonment without parole. The court asked defendant if he understood and defendant replied that he did. The court then accepted defendant's plea.

At the sentencing proceedings, the defendant and his counsel argued in mitigation of sentence. Defense counsel did not argue that the presentence report contained inaccuracies. He did argue that the government's sentencing memorandum contained two factual inaccuracies: the government's allegation that the street value of defendant's drugs was $75,000,000 and the government's claim that defendant was a career criminal. The defendant was then sentenced to life imprisonment without parole and this appeal followed.

Defendant's first contention is that the district court failed to comply with certain requirements of Fed. R. Crim. P. 32 at the sentencing proceeding.

Rule 32(a)(1)(A) requires the court to "determine that the defendant and his counsel have had the opportunity to read and discuss the presentence investigation report***." The record does not show such a determination.

Next Rule 32(c)(3)(A) provides, in part, that "The court shall afford the defendant and his counsel an opportunity to comment on the report, and, in the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in it." We do not find on the record that such an opportunity was afforded, even though defendant and his counsel had been given an opportunity to comment on the government's statement of its evidence and even though defendant and his counsel were accorded the right to speak in mitigation of the punishment pursuant to Rule 32(a)(1)(C).

Parenthetically, we do not find a violation of Rule 32 with respect to the two attacks on the accuracy of the government's factual statement. Defendant admits that these inaccuracies do not appear in the presentence report and thus the district court was not required to resolve the alleged conflicts. Nor do we believe that the failure to do so constituted a due process violation.

Having concluded that the district court failed, insofar as the record shows, to comply with the aforementioned provisions of Rule 32, we must determine whether those omissions require, without more, that the sentence be vacated so that the requirements of Rule 32 may be fully met.

We have no doubt that under the pertinent language of Rule 32 the obligation to make the required determinations on the record is imposed on the court without the need for any request by a defendant or his counsel. This is implicit in the adoption of the various amendments to Rule 32. Furthermore, rather literal compliance with the requirements of the rule negates controversy as to whether a defendant is fully informed of the sentencing process and its consequences. Given the provisions of the Rule, we cannot say on this record that the aberrations were harmless, at least when considered on direct appeal.

We therefore conclude that the sentence imposed on defendant must be vacated and a complete new hearing held and record findings made in accordance with the requirements of Rule 32. We feel impelled to add that the government's attorney should advise the sentencing judge immediately if he believes some mandatory provision of Rule 32 has not been met in the imposition of sentence.

The defendant next contends that the sentencing judge erred in not withdrawing from this case after he testified as a character witness under subpoena in the criminal trial of defendant's then counsel. Defendant's theory is that because of the adverse media publicity

resulting from his testifying, the district judge leaned over backwards to blunt that criticism by here imposing the harshest sentence possible.

The sentencing judge here participated in the *Simone* trial after defendant pleaded but before the sentence. So far as we can ascertain the defendant did not raise this issue before the district judge despite knowledge of the facts prior to the sentencing. In any event, since the matter will be remanded for resentencing, we need not resolve this contention. The defendant, with new counsel, will now be in a position to advance in the district court any position he deems appropriate with respect to the propriety of the district court's sitting on the resentencing.

Defendant contends that he did not receive effective assistance of counsel. Although it is not clear, we infer that the argument is directed to the plea as well as the sentence. This contention, of course, was not raised in the district court and will not be considered on direct appeal. *See United States v. Garcia,* 544 F.2d 681, footnote 1, (3d Cir. 1976). In any event, as to the resentencing, it presumably will be obviated as an issue by our remand.

Defendant contends that the district court erred in not ordering, *sua sponte,* a hearing or a further examination as to defendant's competency. This contention reflects on the plea as well as the sentencing. As to the plea, we are satisfied that it is lacking in merit. The matter will, of course, be open for further consideration insofar as the sentence is concerned.

Defendant contends that the guilty plea was not made with understanding and the requirements of F.R. Crim. P. 11 were breached when the defendant was not adequately informed of the maximum penalty. Defendant also argues that a factual basis for the plea was not established. We have examined the record and find these contentions utterly without merit.

Finally, defendant contends that the sentence of life imprisonment without parole violates the eighth amendment. Since we are vacating the sentence, we conclude that it would be premature, at best, to pass on this contention.[1]

The guilty plea will not be disturbed but the sentence will be vacated so that new sentencing proceedings can be held pursuant to F.R. Crim. P. 32 and an appropriate sentence entered.

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1. The court will not invoke its supervisory power to direct that the proceedings be held before a different judge. However, since defendant indicates in his brief that he intends to file a motion to recuse in the event of a remand, our decision under our supervisory power will be without prejudice in subsequent proceedings.

To the Clerk of the Court:

Please file the foregoing per curiam opinion.

Circuit Judge

APPENDIX D

U.S. Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

28 U.S.C. §144. Bias or prejudice of judge

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

28 U.S.C. §455. Disqualification of justice, judge, or magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter of controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household has a financial interest in the subject matter in controversy or is a party to the proceeding, or has any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an in-

terest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civil organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.